SUPREME COURT, U.S.
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No. 79-1336

In the
Supreme Court of the United States

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY, A Corporation,
Petitioner,

vs.

KALO BRICK & TILE COMPANY,
Respondent.

On Certiorari to the Supreme Court of the United States.

PETITIONER'S BRIEF ON THE MERITS

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QUESTIONS PRESENTED

The Transportation Company operated over a five mile branch line that became physically impassable on April 4, 1973. Kalo was the only shipper on the line. Kalo has sued the Transportation Company in State Court for $350,000 in damages for destruction of its business. All of Kalo's rail shipments over the line were in Interstate Commerce. The Interstate Commerce ("Commission") had entered an order permitting the Transportation Company to abandon the line and finding that cessation of service was not an unlawful abandonment but was due to conditions beyond the Transportation Company's control, and that requiring reconstruction of the line would be an undue burden on the Transportation Company and on interstate commerce.

This case presents the following questions for review:

1. Has the Interstate Commerce Act preempted the power of state courts over rail carriers in matters of railroad line abandonment and provision of car service in interstate commerce?

2. Do the Supremacy Clause of the Constitution and the doctrine of res judicata/collateral estoppel require a state court to give effect to prior decisions of the Commission, acting within its exclusive jurisdiction, involving the same parties and the same issues?

3. Does the Commission, rather than a state court, have primary and exclusive jurisdiction in matters requiring a determination of whether it would be reasonable to require a rail carrier to expend capital to reconstruct a rail line in order to provide interstate service to a shipper in interstate commerce?

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CONSTITUTIONAL PROVISIONS AND STATUTES

Interstate Commerce Act:

(Title 49 U.S.C. was revised by Public Law 95-473, October 17, 1978, without substantive change. (49 U.S.C. § 10101, et. seq.) Since all cases cited in this brief refer only to the pre-revision section headings, the argument in this brief also refers to those section headings. The pre-revision sections are correlated here with the sections of the new revised Act.)

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OPINIONS BELOW

The Findings of Fact, Conclusions of Law and Judgment of the District Court of the State of Iowa in and for Webster County, filed July 29, 1977, are unreported and appear at Appendix pages 12a-33a.

The opinion of the Iowa Court of Appeals, filed October 18, 1979, is unreported and appears at Appendix pages 2a-12a.

The Order of the Supreme Court of Iowa, filed November 30, 1979, is unreported and appears at Appendix page 1a.

JURISDICTION

The Order of the Supreme Court was rendered on November 30, 1979, and is final. This Court has jurisdiction to review the judgment by Writ of Certiorari under 28 USC §1257(3).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The state statutes involved are §479.3, Code of Iowa, 1973, and §479.122, Code of Iowa, 1973. The federal statutes involved are the Interstate Commerce Act, 49 U.S.C. §1, et seq., and more particularly 49 U.S.C. §1(4), (10), (11), (13), (14), (17), (18), and (20); §8; and §9. Article VI, Clause 2 ("Supremacy Clause"), of the Constitution of the United States is also involved. (Appendix pp. 42a-52a.)

STATEMENT OF THE CASE

On April 4, 1973, the Chicago and North Western Transportation Company ("Transportation Company") ceased operating trains over its branch line to Kalo Brick & Tile Company's ("Kalo") plant site. On November 14, 1973, the Transportation Company applied to the Interstate Commerce Commission, pursuant to the provisions of the Interstate Commerce Act, 49 USC § 1(18), for a certificate of public convenience and necessity authorizing it to abandon its line to Kalo. On September 13, 1974, Kalo filed a petition in the Iowa District Court for Webster County seeking $350,000 in damages from the Transportation Company for alleged destruction of Kalo's business. (Joint App. p. 77-78).[1]

The petition, as amended, claims damages based on three state law theories: (1) violation of § 479.3, Iowa

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[1] Pursuant to Rule 30 of the Rules of the Supreme Court for the United States, items already reproduced in the appendix filed as part of the Petition for certiorari have not been reproduced in the Joint Appendix. Matters contained in the appendix to the petition for certiorari are cited in this brief as :(Appendix p. 1a.) Matters contained in the Joint Appendix are cited in this brief as: (Joint App. p. 77.) The appendix contains pages 1a-76a. The Joint Appendix commences with page 77.

Code, 1973, requiring rail carriers to furnish suitable cars to shippers; (2) violation of § 479.122, Iowa Code, 1973, rendering rail carriers liable for damages caused by their negligence; and (3) common law tortious interference with contractual relationships between Kalo and its customers. (Joint App. pp. 77-81; Appendix p. 51a-52a.)[2]

On April 30, 1976, the Commission entered an order permitting abandonment that was affirmed by the Commission's order entered September 23, 1976. (Appendix p. 33a-41a.)

Trial of Kalo's claims commenced October 19, 1976, and ended October 26, 1976.[3] The trial court's Findings of Fact, Conclusions of Law, and Judgment, filed July 29, 1977, dismissed all of Kalo's claims on the grounds that the trial court did not have subject matter jurisdiction, and that in any event the Commission had in prior proceedings decided issues adversely to Kalo that were determinative of all of Kalo's claims and Kalo was collaterally estopped from relitigating those issues. (Appendix p. 12a-33a.)

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[2] The Transportation Company answered that Kalo's sole remedies were under 49 USC § 1, et seq., and that the state court did not have subject matter jurisdiction. (Appendix p. 56a and 64a.)

[3] On November 2, 1976, the Transportation Company filed a Motion to Dismiss stating that pursuant to stipulation of record the Motion would be treated as though it was first made at the close of Plaintiff's evidence and renewed at the close of all the evidence, and raising the defenses of collateral estoppel based on the prior Commission proceedings, lack of subject matter jurisdiction because of the preemption of state law by the Interstate Commerce Act, and lack of subject matter jurisdiction because the issues fell within the primary jurisdiction of the Commission. (Appendix p. 68a-76a.)

The Court of Appeals of Iowa reversed the trial court and remanded for a new trial, holding that the trial court had jurisdiction but not clearly addressing the res judicata/collateral estoppel issue.[4] (Appendix p. 12a.)

The Transportation Company filed with the Iowa Supreme Court an Application for Further Review of the Decision of the Court of Appeals.[5] The Iowa Supreme Court refused to grant further review of the decision of the Court of Appeals. (Appendix p. 1a.)

The facts of the case are as follows:

Prior to April, 1973, the Transportation Company operated trains over a five mile branch line running from Fort Dodge, Iowa, to Kalo. Kalo was the only shipper on the line in 1973, and used the line exclusively for interstate commerce. (Trial Court Opinion, Appendix p. 13a; Testimony of Jerry Schnurr, Appendix p. 33a.) In 1966-1967 earth slides occurred and portions of the Transportation Company's branch line disappeared into the Des Moines River. In order to continue providing trains to Kalo the Transportation Company leased a portion of the

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[4] In Divisions I, II, and III of its Brief to the Court of Appeals the Transportation Company argued that Kalo was collaterally estopped because of the prior Commission proceedings and that the state court lacked subject matter jurisdiction because of the preemption of state law and because the Commission had primary jurisdiction.

[5] In § 2(a), 2(b), and 3 of its Application for Further Review the Transportation Company raised the defenses of lack of subject matter jurisdiction because of the preemption of state law and because the Commission had primary jurisdiction, and also argued that Kalo was collaterally estopped by the prior Commission proceedings.

Fort Dodge, Des Moines & Southern Railway line. (Trial Court Opinion, Appendix p. 14a-15a.)

During the first few days of April, 1973, earth slides occurred along many points of the line leading to Kalo. On April 4, 1973, the Transportation Company notified Kalo that it could no longer send trains to Kalo's plant site because the line was physically impassable. The Transportation Company then provided cars to Kalo at its Fort Dodge, Iowa, station about five miles from Kalo's plant. (Trial Court Opinion, Appendix p. 15a.)

On April 18, 1973, Kalo notified its customers that it was going out of business but would fulfill its existing contracts. (Trial Court Opinion, Appendix 15a.)

Between April 4, 1973, and April 25, 1973, a decision was made by the Transportation Company that it could not maintain safe rail passage over the tracks leading to Kalo and that line was taken out of service by the Transportation Company's road master. The Transportation Company concluded that it could not stabilize the alignment of the tracks but it made no decision at that time as to whether it would attempt to abandon service to Kalo. (Trial Court Opinion, Appendix p. 15a-17a.)

In August, 1973, Kalo stopped production, sold its inventory, and disposed of its assets. (Trial Court Opinion, Appendix p. 17a.)

On November 14, 1973, the Transportation Company applied to the Commission for permission to abandon its line to Kalo. Kalo filed objections to the abandonment and otherwise participated in the abandonment proceed-

ings.[6] After some delay,[7] on April 30, 1976, the I.C.C. entered an order making the following findings of fact:

> "that the cost of rehabilitation of the applicant's line is estimated to be in excess of $150,000; that the cost of rehabilitation of the leased track is estimated to be in excess of $100,000; that, due to the soil condition and mining activities in the area, the repairs would not be sufficient to insure continuous operations on the line . . . That THE CESSATION OF SERVICE OCCURRED BECAUSE OF CONDITIONS OVER WHICH APPLICANT HAD NO CONTROL, NOT BECAUSE OF WILLFUL ABANDONMENT . . . and that, under these circumstances, continued operation of the line would be an unnecessary burden on Applicant and on Interstate Commerce . . ." (Emphasis supplied) (Appendix p. 35a.)

The order provided for issuance of an appropriate certificate of abandonment. Upon Kalo's petition for reconsideration the April 30, 1976, order was affirmed by the I.C.C. in its order entered September 23, 1976. (I.C.C. Orders, Appendix p. 33a-41a.) No appeal was filed.

The trial court made findings of fact that the branch line was built on an unstable area having slopes that were

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[6] See: I.C.C. Orders, Appendix p. 33a-41a; I.C.C. proceedings, Record Def. Ex. YYY, Exhibit Appendix filed in Iowa Supreme Court, p. 19-85, and transmitted with Record to Supreme Court of United States.

[7] The delay resulted because this was the period in which the Commission was wrestling with the problem of how to proceed with abandonment applications in light of the decision in *Harlem Valley Transportation Association* v. *Stafford,* 500 F.2d 328, 335-336 (2nd Cir. 1974), holding that an environmental impact statement must be drafted and other requirements of the National Environmental Policy Act, 42 USC § 4321-4347, must be met before the Commission could permit abandonment of a railroad line.

moving, that there has been a long history of slides on the line, and that "the reason this line was removed from service was because of the slides which were taking place along many points of the line . . ." (Trial Court Opinion, Appendix p. 16a.)

SUMMARY OF ARGUMENT

I.

Kalo has sued the Transportation Company for destruction of Kalo's business, alleging violation of a state law requiring carriers by rail to provide car service to shippers, negligent maintenance of its branch line resulting in cessation of rail service to Kalo's plant site, and intentional cessation of rail service to Kalo's plant site that constitutes intentional and tortious interference with contracts between Kalo and its customers. The factual basis of each of Kalo's theories of recovery is the cessation of rail service to Kalo's plant site and the substituted practice of providing rail service to Kalo at the Fort Dodge, Iowa, rail station located five miles from Kalo's plant. Each of Kalo's three theories is predicated upon the existence under the circumstances of a duty on the part of the Transportation Company to continue providing rail service to Kalo's plant site. Kalo pleaded, and the evidence was undisputed, that Kalo's shipments by rail were in interstate commerce.

Cessation of service over the branch line occurred because the line became physically impassable. A railroad car service statute cannot apply to the facts of this case because issues of car service presuppose the existence of a physically operable line of railroad. This line was embargoed when it became impassable and the only possible

claim Kalo can have would be one charging unlawful abandonment. The Interstate Commerce Act has preempted state law and state court jurisdiction in the area of railroad line abandonments and extensions. The Interstate Commerce Commission ruled before trial of Kalo's claims that the cessation of service over the line was due to physical conditions and mining activities beyond the Transportation Company's control. Kalo was a party to the Commission abandonment proceedings and did not appeal the ruling.

Even if this case is one involving car service issues rather than railroad line abandonment issues, the ICC Act governs and preempts state law in the area. All of Kalo's rail shipments were in interstate commerce and state law is invalid to the extent it affects interstate commerce. The ICC Act permits actions for violation of the duty to provide interstate car service to be brought only before the Commission or in Federal District Court.

Kalo's negligence and tortious interference claims, as well as its state law car service claim, fall if there was no duty to provide interstate rail or car service under the circumstances. Absent such a duty, a negligent or intentional failure to provide interstate rail or car service could not create liability. The ICC Act provisions on abandonment and car service control the determination of whether there was any duty to continue providing rail or car service and those provisions preempt state law in the area. State courts have no jurisdiction to entertain damage actions for violations of the ICC Act abandonment or car service provisions.

II.

The factual basis for all of Kalo's claim is the allegation that the Transportation Company either intentionally, unreasonably, or negligently failed to provide Kalo with rail service. That issue was decided adversely to Kalo in a proceeding to which Kalo was a party, where the Interstate Commerce Commission found that the cessation of service occurred because of physical conditions beyond the Transportation Company's control. The Commission having ruled, Kalo should not be allowed to relitigate the issue in a court of original jurisdiction.

III.

The primary jurisdiction doctrine requires that questions calling for the application of uniform national standards of rail transportation policy must first be presented to the Interstate Commerce Commission. It is well established that whether an interstate railroad is providing an adequate level of service to its shippers is such a question. Accordingly, the state court must defer to the Commission on the central issue of whether the Transportation Company's cessation of service was unlawful. The Commission has already ruled and the issue should be closed.

ARGUMENT

I.

THE INTERSTATE COMMERCE ACT HAS PREEMPTED THE POWER OF COURTS OVER RAIL CARRIERS IN INTERSTATE COMMERCE IN MATTERS OF RAILROAD LINE ABANDONMENT AND PROVISION OF CAR SERVICE OVER THOSE LINES.

The Iowa Court of Appeals erroneously held that the State District Court for Webster County has subject matter jurisdiction to decide whether a rail carrier may be subject to damages for conduct found by a federal agency to be lawful.

Kalo has sued the Transportation Company under three theories. In Kalo's original petition (filed September 13, 1974) it alleged the Transportation Company failed to furnish railway cars or send trains to Kalo's plant site and thereby violated §479.3, Code of Iowa, 1973, requiring railways to "furnish suitable cars to any and all persons who may apply therefore. . . ." (Petition, Paragraph 5, Joint App. p. 78.)

In its Amendment to Petition (filed April 28, 1976) Kalo added two new theories. First, Kalo alleged the Transportation Company caused the track to fail because it was negligent in maintaining the roadbed and that as a result the Transportation Company was "no longer able to provide service to this Plaintiff as required by the laws and statutes of the State of Iowa." (Amend. to Petition, Paragraph 8 of Division II, Joint App. p. 79.) Kalo has contended that such alleged conduct renders the Transportation Company liable for damages for destruction of Kalo's business under §479.122, Code of Iowa,

1973, making any railway liable for "damage sustained by any person . . ." because of the negligence of the railway. The second new theory added by the Amendment to Petition also alleged the Transportation Company was "no longer able to provide service to this Plaintiff as required by the laws and statutes of the State of Iowa . . .", and further charged that the Transportation Company had tortiously interfered with contracts between Kalo and customers in states other than Iowa. (Amend. to Petition, Paragraph 8 and Paragraph 10 of Division III, Joint App. p.78,80.) Kalo has never claimed the Transportation Company violated any federal statute or regulation.

All three theories pleaded by Kalo allege that Kalo ". . . made clay products for sale and shipment by railroad to different parts of the United States. . . ." (Petition, Paragraph 3, Joint App. p.77; Amend. to Petition, Paragraph 3 of Division II and Paragraph 3 of Division III, Joint App. pp.79,80). The undisputed, and only, evidence on the character of the commerce involved came from the testimony of a corporate officer of Kalo (Jerry Schnurr) who said Kalo's intrastate shipments were made by truck and the only use of rail transportation was for shipments in interstate commerce. (Appendix p. 33a). The trial court affirmed this fact. (Trial Court Opinion, Appendix p.13a.)

It has long been recognized that under the Commerce Clause of the Constitution of the United States (Article 1, §8), Congress may enact laws affecting interstate commerce that preempt state law relating to the same subject area. *Gibbons* v. *Ogden,* 22 U.S. (9 Wheaton) 1, 209-211, 221 (1824). The determination of whether state law has been preempted depends upon whether preemption was the purpose of Congress when it enacted the federal

legislation. *Rice* v. *Sante Fe Elevator Corp.*, 331 U.S. 218, 230 (1946). Several methods by which the Court can ascertain such a purpose on the part of Congress were set out in *Rice* v. *Sante Fe Elevator Corp., supra,* at 230:

> "Such a purpose may be evidenced in several ways. The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. . . . Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. . . . Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose. . . . Or the state's policy may produce a result inconsistent with the objective of the federal statute. . . ." (citations omitted)

Clearly, state statutes and common law are preempted when they are inconsistent with federal law. *Gibbons* v. *Ogden*, 22 U.S. (9 Wheaton) 1, 209-211, 221 (1824); *Rice* v. *Sante Fe Elevator Corp.*, 331 U.S. 218, 230 (1946). Likewise, where the purpose of Congress in legislating in an area is to secure uniformity of standards and principles of decision in that area, state law that supplements or complements federal regulation "is as fatal as state regulations which conflict with the federal scheme". *Campbell* v. *Hussey,* 368 U.S. 297, 302 (1961); *Charleston & W.C.R. Co.* v. *Varnville Furniture Co.,* 237 U.S. 597, 604 (1915).[8]

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[8] In *Charleston & W.C.R. Co.* v. *Varnville Furniture Co., supra,* at 604, the Court stated with regard to a state statute held preempted by the federal rail freight loss and damage statute (Carmack Amendment, 49 U.S.C. (1970 ed.) §20(11)):

> "When Congress has taken the particular subject-matter in hand, coincidence is as ineffective as oppo-

The Interstate Commerce Act, 49 U.S.C. (1970 ed.) §1, et. seq.[9], has preempted state statutes and common law in the field of railroad line abandonment. *Powell* v. *United States,* 300 U.S. 276, 287 (1937); *Transit Commission* v. *United States,* 289 U.S. 121, 126-129 (1932). The Act has also preempted state law in the field of provision of car service. *Missouri Pacific RR. Co.* v. *Stroud,* 267 U.S. 404, 407-408 (1925); *United States* v. *New River Company,* 265 U.S. 533, 541-542 (1923); *Hampton* v. *St. Louis, Iron Mountain and Southern Ry. Co.,* 227 U.S. 456, 465 (1912); *Chicago, Rock Island and Pac. Ry. Co.* v. *Hardwick Farmers Elevator Co.,* 226 U.S. 426, 433 (1912). All of Kalo's claims are predicated upon the existence of a duty on the part of the Transportation Company to provide interstate rail service to Kalo's plant site. State law and state court jurisdiction have been preempted in this area by the ICC Act, 49 U.S.C. (1970 ed.)

The Transportation Act of 1920, by adding new sections and by amending the 1917 Esch Car Service Act specifically granted the Commission jurisdiction over car service and railroad line abandonments and extensions in interstate commerce. 49 U.S.C.A. (1959 ed.) §§1(4), 1(11), 1(18), and 1(20), Historical Notes, pp. 67, 117, 147 and 168. The Transportation Act of 1920 greatly expanded the control of the Commission over the nation's railroads

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[8] (Continued)

sition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go."

[9] Title 49, U.S.C. was revised by Public Law 95-473, October 17, 1978. 49 U.S.C. §10101, et. seq. The section headings of the new revised Act are correlated with the section headings of the pre-revision Act in the table of citations, supra. In the body of the argument, citations will be to the pre-revision Act, since all cases cited refer to the pre-vision sections.

for the purpose of enabling the Commission to regulate capital expenditures for rail lines, car supply and distribution, and rates. The concept of the 1920 Act was explained in *Dayton-Goose Greek Railway Company* v. *United States,* 263 U.S. 456 (1923), at 478:

> "In both cases it was pointed out that the Transportation Act adds a new and important object to previous interstate commerce legislation, which was designed primarily to prevent unreasonable or discriminatory rates against persons and localities. The new act seeks affirmatively to build up a system of railways prepared to handle promptly all the interstate traffic of the country. It aims to give the owners of the railways an opportunity to earn enough to maintain their properties and equipment in such a state of efficiency that they can carry well this burden. To achieve this great purpose, it puts the railroad system of the country more completely than ever under the fostering guardianship and control of the Commission, which is to supervise their issue of securities, their car supply and distribution, their joint use of terminals, their construction of new lines, their abandonment of old lines, and by a proper division of joint rates, and by fixing adequate rates for interstate commerce, and, in case of discrimination, for intrastate commerce, to secure a fair return upon the properties of the carriers engaged."

In *Transit Commission* v. *United States,* 289 US 121, 126-129 (1932), the Court commented upon the historic necessity for preemptive federal legislation governing, and exclusive Interstate Commerce Commission authority over the subject of railroad line abandonments and extensions:

> "These provisions do not specifically mention trackage agreements providing for joint use of railroad lines, tracks or other facilities by two or more carriers. The question is whether the general language of paragraph (18) includes the arrangement

under consideration. Prior to the Tarnsportation Act, 1920, regulations coincidentally made by federal and state authorities were frequently conflicting, and often the enforcement of state measures interfered with, burdened and destroyed interstate commerce. Multiple control in respect of matters affecting such transportation had been found detrimental to the public interest as well as to the carriers. Dominant federal action was imperatively called for. Minnesota Rate Cases (Simpson v. Shepard) 230 U.S. 352, 433, 57 L. ed. 1151, 1555, 33 St. Ct. 729, 48 L.R.A. (N.S.) 1151, Ann. Cas. 1916A, 18. And it was everywhere known that enormous sums had been expended by interstate railroad carriers for the construction and operation of lines that were not needed or likely to be needed. Such investments had brought financial ruin to some and had made doubtful the power of many to continue operation in other than flush times. Need for effective regulation in this field had become urgent, and undoubtedly the Congress, by the provisions above referred to, intended to confer upon the Commission plenary power to limit interstate carriers' expenditures for construction or operation to lines of railroad reasonably necessary for the service of the public.

. . . The Act, including paragraph (18) and related provisions, is construed to make federal authority effective to the full extent that it has been exerted and with a view of eliminating the evils that Congress intended to abate. (citations omitted)

. . . On the taking effect of the Transportation Act the state commission was stripped of power to prescribe terms for such operation. The authority of the Interstate Commerce Commission is paramount and, in respect of the operation and agreement under consideration, it is necessarily exclusive."

In its original petition Kalo claimed the facts of this case give rise to an action for damages for violation of a state ralroad car service statute, §479.3, Code of Iowa,

1973. Since Kalo commenced its action in state court, it had no choice but to characterize this as a car service case because there are no Iowa statutes concerning abandonment of lines and in any event federal law has clearly preempted state law in the area of railroad line abandonment and extensions. *Transit Commission* v. *United States,* 289 U.S. 121, 126-129 (1932).

However, this is not a case involving failure to provide car service, for car service issues presume the physical ability to move cars over a line. (Trial Court Opinion, Appendix p. 21a.) That is, car service issues presume the existence of a physically operable line of railroad. No such line existed in this situation and the Commission found that the absence of a physically operable line did not result from any unlawful act of the Transportation Company. The Commission further found, in an unappealed order, that the cessation of service was not unlawful. (Appendix p. 35a-36a.) In this case the Transportation Company lawfully imposed an embargo and took its line out of service because of physical conditions, and gave required notice to Kalo, the only shipper on the line. (Trial Court Opinion pages 3-6, Appendix p. 15a.) The practice of instituting embargoes when lines become physically inoperable is well recognized. *Chicago and North Western Ry. Co.* v. *Union Packing Co.,* 373 F.Supp. 734, 736-737 (D. Ne. 1974); *Myers* v. *Arkansas and Ozarks Railway Corp.,* 185 F. Supp. 36, 41-42 (W.D. Ark. 1960); *Asbury* v. *Chesapeake & Ohio Railway Company,* 314 F. Supp. 310, 312-313 (D.D.C. 1970).[10]

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[10] Also, see, *General Foods Corporation* v. *Baker,* 451 F.Supp. 873, 876-877 (D. Md. 1978); *Holt Motor Company* v. *Nicholson Universal S.S. Co.,* 56 F.Supp. 585, 590-592 (D. Mi. 1944); and see, *Eastern Railway Co.* v *Littlefield,* 237 U.S. 140, 144-145 (1915).

"'Car service' connotes the use to which vehicles of transportation are put; not the transportation service rendered by means of them." *Peoria & P. U. R. Co.* v. *United States,* 263 U.S. 528, 533 (1923); *I.C.C.* v. *Oregon Pacific Industries, Inc.,* 420 U.S. 184, 189 (1975). Car service statutes do not apply where freight service over a branch line is discontinued and abandoned. *Burlington Northern* v. *Department of Public Service,* 240 N.W.2d 554, 558-559 (Mn. 1976).

This case is obviously one whose issues must be decided under the federal law governing railroad line abandonments, rather than the state law governing car service, negligence, or tortious interference actions. Yet the Iowa Court of Appeals refused to even address the question of whether this case was one dealing with abandonment issues and was consequently a case in which the ICC Act preempted State law. (Iowa Court of Appeals Opinion, Appendix p. 12a.)

The line was lawfully abandoned pursuant to an order of the Interstate Commerce Commission entered before trial and judgment in this action. (Trial Court Opinion Appendix p. 27a-30a; Def. Exhibit YYY, Appendix p. 33a-40a.) An "abandonment" of a rail line is governed exclusively by the provisions of the Interstate Commerce Act, 49 U.S.C. (1970 ed.) §§1(18) and 1(20), and a suit for injunction in federal district court under 49 U.S.C. (1970 ed.) §1(20) affords the only remedy for unlawful abandonment of a line. *Powell* v. *United States,* 300 U.S. 276, 287 (1937).[11]

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[11] Also see: *Texas & P. R.I.* v. *Gulf C. & S.F. Ry.,* 270 U.S. 266, 272-273 (1926); *S.H. & W. Lumber Co.* v. *California & O.C. R.R.,* 154 F.Supp. 152, 154 (D. Or. 1957); *Asbury* v. *Chesapeake & O. Ry.,* 314 F.Supp. 310, 312 (D.D.C. 1970). *Contra, Ethan Allen, Inc.* v. *Maine Central Railroad Co.,* 431 F.Supp. 740 (D.Vt. 1977).

Even if this case involved an unlawful abandonment, which the Commission specifically found not to be the case, Kalo would have to bring its action in Federal District Court or before the Commission. 49 U.S.C. (1970 ed.) §9. There are no Iowa statutes providing any remedy for abandonment of rail lines. (Trial Court Opinion, Appendix p. 23a.) Kalo never sought an injunction or damages in Federal District Court or before the Commission.

To reach issues of car service, it must be assumed that a physical line exists, and the Commission determined that a physical line ceased to exist because of conditions beyond the Transportation Company's control. Even if it is assumed, *arguendo,* that this is a car service case, 49 U.S.C. (1970 ed.) §§1, 8, and 9 cover the whole field of railroad car service in interstate commerce and enactment of that federal legislation rendered invalid state statutes and the common law to the extent that they purport to regulate railroad car service in interstate commerce. *Hampton* v. *St. Louis, Iron Mountain and Southern Ry. Co.,* 227 U.S. 456, 465 (1912); *Chicago, Rock Island & Pac. Ry. Co.* v. *Hardwick Farmers Elevator Co.,* 226 U.S. 426, 433, 436 (1912); *Missouri Pacific R.R. Co.* v. *Stroud,* 267 U.S. 404, 407-408 (1925); *United States* v. *New River Company,* 265 U.S. 533, 541-542 (1923).

Indeed, even if a party was claiming damages under 49 U.S.C. (1970 ed.) §1 (11), the car service statute, it could pursue its damage claim only before the Interstate Commerce Commission or in a Federal District Court.[12]

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[12] This requirement of 49 U.S.C. (1970 ed.) §9 was not discussed in *Chicago, Rock Island & Pac. Ry. Co.* v. *Linwood Stone Products Co.,* 138 N.W.2d 902 (Ia. 1965), or in *Baird Brothers* v. *Minneapolis & St. Louis Railroad Co.,* 181 Iowa 1104, 1123, 165 N.W. 412 (1917), which were relied on by the Iowa Court of Appeals.

49 U.S.C. (1970 ed.) §9; *Interstate Commerce Comm.* v. *Atlantic Coast Line Co.*, 383 U.S. 576, 579 (1966).[13]

The Iowa Court of Appeals erroneously ruled in general terms that Iowa may regulate service in interstate commerce so long as the regulation is not inconsistent with and does not interfere with the provisions of the Interstate Commerce Act. (Court of Appeals Opinion, Appendix p. 8a.) In the context of this case the result of this erroneous ruling is to give a state district court the power to award damages for failure to provide car service where there are unappealed findings by the Commission that the cessation of service was not unlawful.

To support its ruling the Iowa Court of Appeals relied upon a few early cases indicating that state courts have jurisdiction concurrent with the Commission and federal courts to decide claims of failure to provide adequate car service in interstate commerce.[14] However, those cases were decided prior to the Esch Car Service Act (1917) and the Transportation Act of 1920, which clearly evidence the intention of Congress to rest exclusive jurisdiction over provision of interstate car service and railroad line abandonment with the Commission and the federal courts. *Missouri Pacific R.R. Co.* v. *Stroud*, 267 U.S. 404, 407-408 (1925); *Powell* v. *United States*, 300 U.S. 276, 287 (1937); *Transit Commission* v. *United States*, 289 U.S. 121, 126-129 (1932).

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[13] Also see, *Burlington Northern, Inc.* v. *Department of Public Service*, 240 N.W.2d 554, 559 (Mn. 1976); *Auracher* v. *Omaha & St. L. R. Co.*, 102 F. 1, 2 (Cir. Ct. S. D. Ia. 1900).

[14] The Iowa Court of Appeals mistakenly relied upon *Pennsylvania R.R. Co.* v. *Puritan Coal Mining Co.*, 237 U.S. 121 (1915), *Illinois Central R.R. Co.* v. *Mulberry Hill Coal Co.*, 238 U.S. 275 (1915), and *Pennsylvania R. Co.* v. *Sonman Shaft Coal Co.*, 242 U.S. 120 (1916).

49 U.S.C. (1970) ed. §1(11) is the federal statute requiring carriers to provide "adequate car service" to shippers. That paragraph was added to the ICC Act in 1917 (Esch Car Service Act) and was amended by the Transportation Act of 1920. 49 U.S.C.A. (1959 ed.) §1(11), Historical Notes, p. 117; ch. 23, 40 Stat. 101 (1917); ch. 91, §402, 41 Stat. 476 (1920). Since cases decided before these Acts do not address the federal car service statute, they most assuredly do not constitute reliable authority on the issue of whether state power has been preempted by the ICC Act in the area of provision of car service in interstate commerce.

Cases decided after the Transportation Act of 1920 hold that federal statutes have preempted the field of provision of car service in interstate commerce and that state law is invalid in that area. *Missouri Pacific R.R. Co.* v. *Stroud,* 267 U.S. 404, 407-408 (1925); *Unted States* v. *New River Company,* 265 U.S. 533, 541-542, 610 (1923).

In *Missouri Pacific Railroad Company* v. *Stroud,* 267 U.S. 404, 407-408 (1925), a shipper sued a rail carrier in state court charging violation of a state car service statute providing for an award of treble damages against a shipper found to have violated the act. In *Missouri Pacific Railroad Company* v. *Stroud, supra,* at 267 U.S. 407-408, the Court said:

> "Congress in the exertion of its power over commerce among the states, has enacted laws for the regulation of the furnishing of cars to shippers. Interstate Commerce Act §1, (3), (4), (6), (10), (11), (12), (14); §3 (1); §15 (1). See *United States* v. *New River Co.,* 265 U.S. 533, 451, 68 L.Ed. 1165, 1172, 44 Sup. Ct. Reg. 610. . . . The state law has no application to the furnishing of cars to shippers for the

transportation of freight in interstate commerce." (Citations omitted)

The few cases that have permitted concurrent state jurisdiction over provision of interstate car service have cited 49 U.S.C. (1970 ed.) §22 in support of state jurisdiction, but the cases were decided before enactment of comprehensive federal car service and railroad line abandonment legislation. (Transporation Act of 1920 and 1917 Esch Car Service Act).[15] 49 U.S.C. (1970 ed.) §22 is a lengthy provision dealing with rates whose texts includes the following clause:

". . . .and nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies. . . ."

The quoted clause appeared in the original ICC Act of 1887, prior to enactment of Congress' comprehensive legislation in the areas of car service and railroad line abandonment. The clause does not operate to create state court jurisdiction in areas where federal legislation has preempted the states. *Texas & Pacific Railway Company* v. *Abilene Cotton Oil Company,* 204 U.S. 426, 404-441, 446-447 (1906); *T.I.M.E.* v. *United States,* 359 U.S. 464, 473-474 (1959); *Adams Express Company* v. *Croninger,* 226 U.S. 491, 504-509 (1912).[16]

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[15] The cases decided before these acts that permitted concurrent state jurisdiction are set out, *supra,* at note 14.

[16] *Adams Express Company* v. *Croninger, supra* dealt with the Federal freight loss and damage statute (Carmark Amendment, 49 U.S.C. (1970 ed.) §20(11), ch. 3591, §6, 34 Stat. 593 (1906)). In *Adams Express Company* v. *Croninger, supra,* at 504-505, the Court said the purpose of the Carmack Amendment was to end the diversity of principles upon which freight loss damages were awarded

Even before passage of the Transportation Act of 1920 and the Esch Car Service Act, the United States Supreme Court held that state law was invalid to the extent it attempted to regulate the furnishing of railroad cars for interstate shipments. *Chicago, Rock Island and Pac. Ry. Co.* v. *Hardwick Farmers Elevator Co.*, 226 U.S. 426, 433 (1912); *Hampton* v. *St. Louis, Iron Mountain and Southern Ry. Co.*, 227 U.S. 456, 465 (1912). The clause quoted above from 49 U.S.C. (1970 ed.) §22 does not alter the fact that state law clearly is now preempted by the ICC Act in the areas of interstate car service and railroad line abandonment, and no jurisdiction has been preserved in state courts to entertain damage actions in those areas. *Missouri Pacific R.R. Co.* v. *Stroud*, 267 U.S. 404, 407-408 (1925); *Powell* v. *United States*, 300 U.S. 276, 287 (1937); *Transit Commission* v. *United States*, 289 U.S. 121, 126-129 (1932). The ICC Act permits claims only before the Commission or in Federal District Court. 49 U.S.C. (1970 ed.) §9; *Interstate Commerce Commission* v. *Atlantic Coast Line Co.*, 383 U.S. 576, 579 (1966).

Texas & Pacific Railway Company v. *Abilene Cotton Oil Company*, 204 U.S. 426, 440-441, 446-447 (1906), dealt with an action for damages in state court in which a shipper claimed interstate freight rates charged to it

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[16] (Continued)
in the various states. The Court also said that neither the proviso in §22 of the ICC Act, nor the proviso in §20(11) of the Act preserving ". . . any remedy or right of action which (a shipper) has under existing law. . .", were intended to preserve state law damage claims, since to do so would destroy the uniformity of decision and control sought by the Act. *Adams Express Company* v. *Croninger, supra*, at 507-508. The §22 proviso and the §20(11) proviso were revised in the same section (49 U.S.C. §10103) in the revised Act.

were excessive and unreasonable. The Commission had never ruled the rates unreasonable. The Supreme Court of the United States held that the state court had no jurisdiction over the claim because allowing such a state court damage action would be "wholly inconsistent with the administrative power conferred upon the Commission" and would prevent achieving the uniformity of decision the ICC Act sought. *Texas and Pacific Railway Company* v. *Abilene Cotton Oil Company, supra,* at 440-441. In response to the shipper's contention that §22 of the ICC Act saved his state court damage action, the Court stated:

> ". . . This clause, however, cannot in reason be construed as continuing in shippers a common-law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself. . . ." *Texas and Pacific Railway Company* v. *Abilene Cotton Oil Company, supra,* at 446-447.

The Court's refusal in *Abilene Cotton* to construe §22 to permit a result that would be inconsistent with other provisions of the Act and the purposes underlying those provisions has been noted with approval in later cases. *T.I.M.E.* v. *United States,* 359 U.S. 464, 473-474 (1959); *Arrow Transportation Company* v. *Southern Railway Company,* 372 U.S. 658, 671, at note 22 (1963).

The United States Supreme Court previously denied certiorari in a case having facts similar to the present case and in which the Court of Appeals for the Ninth Circuit ruled there was no state court jurisdiction. In *Bodine & Clark Livestock Commission Co.* v. *Great Northern Ry. Co.,* 63 F.2d 472, 478 (9th Cir. 1933), cert. denied 290 U.S. 629 (1933), a shipper sued in Federal District Court claiming damages for increased shipping costs it sustained because a rail carrier instituted a new operating practice restricting west-bound interstate shipments of cattle to

one train weekly. While the suit was pending the Interstate Commerce Commission ruled that the carrier's practice was not unreasonable and so did not violate the ICC Act. *Bodine & Clark Livestock Commission Co.* v. *Great Northern Ry. Co., supra,* at 63 F.2d 474. The shipper contended that common law required the carrier to accept and transport livestock with reasonable dispatch, and that 49 U.S.C. §22 preserved the shipper's common law cause of action for damages. Quoting from *Texas & Pacific Railway Company* v. *Abilene Cotton Oil Company, supra,* the Court of Appeals for the Ninth Circuit held that §22 did not preserve the state law action for damages because such an interpretation of §22 would effectively destroy the ICC Act. *Bodine & Clark Livestock Commission Co.* v. *Great Northern Ry. Co., supra,* at 63 F.2d 478.

The same reasoning applies in the present case. The Transportation Company instituted a new operating practice that eliminated some interstate service previously available to Kalo.[17] Under its new operating practice it provided rail cars to Kalo at the Transportation Company's Fort Dodge, Iowa, station, located about five miles from Kalo's plant. As was the case in *Bodine & Clark Livestock,* the new operating practice of the Transportation Company affected interstate rail service and was therefore a matter governed by the ICC Act and not state law. During the pendency of Kalo's state court suit, the Commission ruled the new operating practice had been reasonable under the circumstances and not unlawful. Therefore, as in *Bodine & Clark Livestock Commission Co.* v. *Great Northern Ry. Co., supra;* 49 U.S.C. (1970 ed.) §22 should not be construed in the present case to permit

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[17] The new operating practice did not increase shipping costs paid by Kalo because it passed the increased costs on to its customers. (Trans. p. 66-67).

a state court damage action because to do so would be directly contrary to the purposes and objectives of the ICC Act and would destroy the administrative power of the Commission.

In 49 U.S.C. (1970 ed.) §1(17)(a) Congress has specifically addressed the extent to which state power over provision of rail service has been preserved, and Congress limited state power in that area to intrastate shipments. 49 U.S.C. (1970 ed.) §1(17)(a) provides:

> "Provided, however that nothing in this chapter shall impair or affect the right of a State, in the exercise of its police power, to require just and reasonable freight and passenger service for intrastate business, except insofar as such requirement is inconsistent with any lawful order of the Commission made under the provisions of this chapter and except as otherwise provided in this chapter."

Nothing in §1(17)(a) authorizes what is happening in the present case. §1(17)(a) does not say and should not be construed to mean that a state may exercise the power to determine whether a carrier is providing reasonable interstate service. Such a construction deprives the limiting word "intrastate" of any meaning.

Each of Kalo's three theories of recovery require a ruling that under the circumstances existing the Transportation Company had a duty to provide rail service at Kalo's plant site for *interstate* shipments. The existence of such a duty on the part of the Transportation Company is obviously required under Kalo's car service theory, since all Kalo's rail shipments were undisputably in interstate commerce. Likewise, assuming *arguendo,* that the Transportation Company negligently or intentionally caused the track to become physically impassable, such con-

duct standing alone could not possibly create any liability on the part of the Transportation Company absent a duty to provide interstate rail service to Kalo's plant site.

Even if this was a "car service" case (which it is not), and even if a state court action for damages for unlawful abandonment was permissible under the ICC Act (which is not the case), it would not be sufficient for Kalo to merely prove in state court that the Transportation Company negligently or intentionally rendered the line of railroad impassable. Kalo would still need a ruling that the negligent or intentional conduct of the Transportation Company breached a *duty to provide interstate rail service* to Kalo's plant site. If under the circumstances existing there was no such duty, Kalo could not recover damages for failure to provide rail service. Clearly, the areas of provision of interstate railroad car service and railroad line abandonment have been preempted by federal law. *Missouri Pacific Railroad Company* v. *Stroud,* 267 U.S. 404, 407-408 (1924); *Powell* v. *United States,* 300 U.S. 276, 287 (1937); *Transit Commission* v. *United States,* 289 U.S. 121, 126-129 (1932). Where federal law preempts state law, an action may not be based upon state law, and it is immaterial that the action is one for damages. *Missouri Pacific Railroad Company* v. *Stroud,* 267 U.S. 404, 407-408 (1924) (action for treble damages based on state car service statute not permissible where shipments are interstate). Thus, an action grounded upon the issue of whether a rail carrier has a duty to provide interstate rail service can only be pursued under the ICC Act and only before the Commission or in Federal District Court. *Interstate Commerce Comm.* v. *Atlantic Coast Line Co.,* 383 U.S. 576, 579 (1966); 49 U.S.C. (1970 ed.) §9.

The interstate commerce operations of rail carriers should be treated uniformly in all states, including Iowa.[18] The Iowa Supreme Court decision in the present case allows an Iowa State District Court to penalize a rail carrier by awarding damages for failure to expend substantial capital funds to reconstruct a railroad line running to Kalo's plant site for the purpose of improving Kalo's interstate rail service.[19] This ruling, if not overturned, allows state courts to regulate interstate rail service by

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[18] The exclusive domain of Federal statutes in the area of regulation of railroad car service and line abandonments and extensions in interstate commerce has been recognized by the high courts of states other than Iowa. *In Re Rules and Regulations Nos. 31 and 32,* 225 N.W.2d 401, 408 (Neb. 1975); *Burlington Northern, Inc.* v. *Department of Public Service,* 240 N.W.2d 554, 556-559 (Mn. 1976); *Chicago, M., St. P. & P. R. Co.* v. *Michigan Pub. Serv. Commission,* 50 N.W.2d 884, 887 (Mi. 1952); *Davis* v. *Keystone Steel & Wire Co.,* 148 NE 47, 50-51 (Ill. 1925); *Louisville & N.R. Co.* v. *Brashear,* 289 S.W. 1094, 1098-1099 (Ky. 1927). It has been held that 49 U.S.C. §§1(10) and 1(11), as administered by the I.C.C., govern whether the frequency of service may be reduced on a branch line carrying 82.1% interstate traffic. *Burlington Northern, Inc.* v. *Department of Public Service, supra,* at 240 N.W.2d 557-558. The Supreme Court of Michigan has ruled that a state regulatory agency has no power to require a rail carrier to operate an unprofitable line which, although it would have benefited intrastate commerce, was primarily intended to improve interstate rail service afforded to the area in question. *Chicago, M., St. P. & P. R. Co.* v. *Michigan Public Service Commission, supra,* at 50 N.W.2d 887.

[19] In *Charleston & W.C.R. Co.* v. *Varnville Furniture Co.,* 237 U.S. 597, 603-604 (1915), the Court said that a state freight damage law imposing a fifty dollar penalty was a burden on interstate rail service but that in any event the fact of the burden was immaterial because Congress had enacted legislation that preempted state law in the area.

penalty. In the present case this ruling also allows a state court to overrule a prior decision of the Interstate Commerce Commission on issues concerning interstate commerce (Section II infra).

II.

ISSUES DETERMINATIVE OF KALO'S CLAIMS WERE DECIDED IN A VALID FINAL JUDGMENT OF THE COMMISSION IN THE KALO LINE ABANDONMENT PROCEEDINGS TO WHICH BOTH THE TRANSPORTATION COMPANY AND KALO WERE PARTIES.

The essential question to be resolved by the Commission in any abandonment proceeding where the condition of a line is in issue is whether that condition is due to a railroad's neglect or to circumstances beyond the railroad's control. *Missouri-Kansas-Texas Railroad Company Abandonment Between Altos and Forgan, Oklahoma,* 338 ICC 728, 743-748 (1971).

In the Kalo Line Abandonment Proceedings, the Commission explicitly held that the cessation of service on the line serving Kalo occurred ". . . because of conditions over which applicant had no control, not because of willful abandonment. . .", and that ". . . due to the soil condition and mining activities in the area, the repairs would not be sufficient to ensure continued operations on the line. (I.C.C. Order entered April 30, 1976, Appendix p. 35a.))

These factual findings negate the basis for any of Kalo's state law claims, and were clearly material to the issuance of the certificate of Abandonment. Kalo claims damages for failure to furnish car service, negligent maintenance of the line serving Kalo, and tortious interference by the Transportation Company with Kalo's contractual relations. All three claims necessarily imply that the Transportation Company either unreasonably or negli-

gently failed to provide cars or rail service to Kalo and maintain its line of track, or intentionally injured Kalo by failing to provide cars or rail service and maintain its line of track. The Commission stated that in fact the cessation of service occurred because of conditions beyond the Transportation Company's control, not because of negligence or malevolent intent.

Kalo's attempted relabeling of its claims in state law terms has no effect on the Commission factual findings; "the . . . statutory scheme would be too easily avoided if a party could compel relitigation of a matter once decided by a mere exercise of semantics." *United States* v. *Utah Constr. and Mining Co.*, 384 U.S. 394, 419 (1966).

The Transportation Company's duty to furnish car service to Kalo under Section 479.122 of the 1973 Iowa Code was not absolute, even if the statute provided no express exceptions or defenses to the duty. Interpreting such a statute in *Hampton* v. *St. Louis, Iron Mountain and Southern Railway Company*, 227 U.S. 456 (1912), this Court held that a railroad's duty to provide car service is not absolute and that ". . . any reasonable excuse for a failure to furnish cars upon the requirements of a shipper, may be interposed." *Hampton* v. *St. Louis, Iron Mountain and Southern Railway Company, supra*, at 227 U.S. 466.

The Court further stated:

> "The cases referred to make it clear that the statutory duty of furnishing cars upon the reasonable notice of a shipper is not absolute, and that the legislature did not intend to impose upon railroad companies the duty of furnishing cars to a particular shipper regardless of its equal duty to other shippers, state and interstate, or to a situation *due to some unusual and unavoidable condition which made it un-*

reasonable that it should be penalized for noncompliance. . ." (Emphasis supplied)
227 U.S. 456, 468.

The Commission found such an unusual condition and found it unreasonable to penalize the Transportation Company for that condition. (I.C.C. Order entered April 30, 1976, Appendix p. 34a-36a.)

Where the elements of collateral estoppel are present, a determination of factual issues by the Interstate Commerce Commission precludes relitigation of the issues. Constitution of the United States, Article VI, Clause 2 ("Supremacy Clause"); *Baltimore & Ohio Railroad Company, et al.* v. *New York, New Haven & Hartford Railroad Company,* 196 F.Supp. 724, 744-745 (S.D.N.Y. 1961); *Seatrain Lines, Inc.* v. *Pennsylvania R. Co., et al.,* 207 F.2d 255, 259 (3d Cir. 1953).[20]

All the elements of collateral estoppel are present. (Trial Court Opinion, Appendix p. 27a-30a.) Kalo was a party to the abandonment proceeding. Since any state claims it may have had arose at or before the time of the proceeding, Kalo knew that the issue of the abandonment would be important in potential future litigation. It had a full and fair opportunity to litigate the abandonment before the I.C.C. and did so. The issues precluded by the I.C.C. findings were material to all of Kalo's state law claims. The Transportation Company's abandonment was found to be reasonable, unintentional, and free of negligence. Kalo could have taken advantage of statutory

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[20] Also, see *Board of Supervisors, Carroll County* v. *Chicago and North Western Transportation Company,* 260 N.W.2d 813, 815 (Ia. 1977); *United States* v. *State of South Dakota,* 212 F.2d 14, 16 (8th Cir. 1954); *Landreth* v. *Wabash R. Co.,* 153 F.2d 98, 100 (7th Cir. 1946), cert. denied, 328 U.S. 855, 55 S.Ct. 1345, 90 L.Ed 1627 (1946).

provisions for appeal of the Commission findings, but did not do so. Kalo should not be allowed to relitigate the issue in a court of original jurisdiction. *Siba Corp.* v. *Weinberger, Secretary of Health, Education and Welfare, et al.*, 412 U.S. 640 (1973).

III.

THE INTERSTATE COMMERCE COMMISSION HAS PRIMARY JURISDICTION OVER ISSUES NECESSARY TO THE PROOF OF KALO'S CLAIMS.

"National rather than local control of interstate railroad transportation has long been the policy of Congress." *Chicago* v. *Atchison, Topeka & Sante Fe R. Co.*, 357 U.S. 77, 87 (1958). The Interstate Commerce Commission has primary, jurisdiction over "issues of transportation policy which ought to be considered by the Commission in the interests of a uniform and expert administration of the regulatory scheme laid down by [the] Act." *Interstate Commerce Comm.* v. *Atlantic Coast Line Co.*, 383 U.S. 576, 579 (1966). If an action for damages in Federal District Court involves issues that fall within the primary jurisdiction of the Interstate Commerce Commission, those issues must be referred to the Commission for determination. *Interstate Commerce Comm.* v. *Atlantic Coast Line Co.*, 383 U.S. 576, 579 (1966). There is no mechanism allowing referral of issues from a state court to the Commission.

Assuming *arguendo* that this is a car service case and that a state court can in some instances have concurrent jurisdiction with the Commission over car service where elements of intrastate commerce are present, this case would still have to be dismissed in state court because (a) there was no intrastate commerce and (b) the Commission

had already decided that the cessation of service was lawful.

The claims of Kalo all depend upon the issue of the reasonableness of the Transportation Company's operating practice of ceasing operation over its line to Kalo's plant and providing cars to Kalo at the Fort Dodge, Iowa rail station. Even a federal court loses jurisdiction to the Commission in a car service case where the issue is whether a rail carrier's rule or practice is reasonable. Federal courts have jurisdiction only when a rule or practice of the rail carrier is admittedly reasonable and the only issue to be decided is whether the carrier adhered to the rule or practice. *Midland Valley RR. Co.* v. *Barkley, et al.*, 276 U.S. 482, 484-487 (1927); *U.S.* v. *New River Co.*, 265 U.S. 533, 541-542 (1923).[21] The same is of course true as to a state court, and that is particularly clear where, as here, the Commission has already ruled the practice is lawful. Even the trial court judge ruled that the issues in this case should be decided by the Commission rather than a county court judge. (Trial Court Opinion, Appendix p. 21a, 24a).

The Commission has been held to have primary jurisdiction to decide whether a rail carrier may institute a new practice of providing service to a shipper on a less frequent basis. *Elgin Coal Co.* v. *Louisville & Nashville R.R. Co.*, 411 F.2d 1043, 1045-1046 (6th Cir. 1969). The Supreme

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[21] Also, see *Morrisdale Coal Co.* v. *Pennsylvania R.R. Co.*, 230 U.S. 304, 313-314, 57 L.Ed. 1494, 1497, 33 S.Ct. 938 (1912); *Loomis* v. *Lehigh Valley RR. Co.*, 240 U.S. 43, 50-51, 60 L.Ed. 517, 519-520, 36 S.Ct. 228 (1916); *I.C.C.* v. *Baltimore & Annapolis R.R. Co.*, 398 F.Supp. 454, 467-468 (D. Md. 1975), aff'd 537 F.2d 77 (4th Cir.) cert. denied 429 U.S. 859, 97 S.Ct. 159, 50 L.Ed. 2d 136 (1976).

Court of the United States held a state court could not even entertain an action to require a rail carrier to construct inside doors on its produce hauling cars because the Interstate Commerce Commission had primary jurisdiction over the issue. *Loomis* v. *Lehigh Valley R.R. Co.*, 240 U.S. 43, 48-51 (1916).[22] Certainly a rail carrier should not be subject to an award of substantial damages against it for failure to make a large investment necessary to continue operations over a railroad line unless the Commission first decides the carrier's conduct has been unreasonable.

Even if one assumes that the Iowa District Court for Webster County did at one time have concurrent jurisdiction with the Commission, it has no jurisdiction now because it cannot act in a manner inconsistent with an order of the Commission. *Far East Conference* v. *United States,* 342 U.S. 570, 574-575 (1952); 49 U.S.C. §1 (17) (a). The Iowa Supreme Court's disregard of an existing, unchallenged order of the Commission amounts to an attempt to enlarge the jurisdiction of Iowa district courts in a manner not permitted by Title 49 of the United States Code.

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[22] Both *Pennsylvania R.R. Co.* v. *Puritan Coal Mining Co.*, 237 U.S. 121, 130 (1915) and *Illinois Central R.R. Co.* v. *Mulberry Hill Coal Co.*, 238 U.S. 275, 280-281, (1915), relied upon in the Iowa Court of Appeals opinion, were distinguished in the later case of *Midland Valley R.R. Co.* v. *Barkley,* 276 U.S. 482, 486-487 (1927), by the Hon. Justice Brandeis on the grounds that in neither *Puritan* nor *Illinois Central* "was the reasonableness of the carriers' practice in controversy." Likewise, *Pennsylvania R. Co.* v. *Sonman Shaft Co.,* 242 U.S. 120, 125-126 (1916), also relied upon by teh Iowa Court of Appeals, did not involve the question of the reasonableness of the defendant's practice. See, *Spence* v. *Baltimore & Ohio Railroad Company,* 360 F.2d 887, 890 (7th Cir. 1966).

CONCLUSION

The Interstate Commerce Act has preempted state law in the subject matter area of this case. Kalo's sole remedies under the Act lie in federal district court or before the Commission. Furthermore, the doctrine of primary jurisdiction gives the Commission exclusive jurisdiction over the issues that are determinative of Kalo's claims. Yet in this case, the Iowa Court of Appeals has not only refused to follow the federal doctrines of preemption and primary jurisdiction, but has also refused to give effect to the Commission orders that collaterally estop Kalo from relitigating the issues necessary to the proof of its claims. The position taken by the Iowa Court of Appeals on the issues presented in this case is an improper attempt to enlarge the jurisdiction of the state district courts of Iowa by refusing to follow the governing federal law.

For these reasons, and others set forth above in this brief, petitioner respectfully prays that this Court enter judgment taxing costs to Kalo, reversing the judgment of the Iowa Court of Appeals, and ordering the Iowa Court of Appeals to reinstate the judgment of the Iowa District

Court of Webster County, Iowa, dismissing with prejudice:

1) Kalo's original petition;

2) Kalo's Division II of its petition, as amended;

3) and Kalo's Division III of its petition, as amended.

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